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SERVICE DATE - MARCH 30, 1999

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-402 (Sub-No. 6X)

FOX VALLEY & WESTERN LTD.--ABANDONMENT EXEMPTION--IN
WAUPACA COUNTY, WI

Decided: March 24, 1999

By petition filed December 10, 1998, Fox Valley & Western Ltd. (FVW)¹ seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903-05² to abandon a 10.7-mile line of railroad, known as the Manawa-Scandinavia Line, extending from milepost 50.3 near Manawa to the end of the line at milepost 61.0 in Scandinavia, in Waupaca County, WI. The Board published a notice in the Federal Register (63 FR 71669-70) on December 29, 1998 (served December 30, 1998), instituting an exemption proceeding. A request for issuance of a notice of interim trail use (NITU) was filed by the Wisconsin Department of Natural Resources (WisDNR),³ acting through the Wisconsin Department of Transportation (WisDOT).⁴ We will grant the exemption, subject to trail use, environmental conditions, and standard employee protective conditions.

BACKGROUND

FVW, a Class II rail carrier, operates approximately 450 miles of rail line in Wisconsin. The only active shipper on the line proposed for abandonment is Anthony Farms, which uses the station at Scandinavia. FVW avers that it has informed Anthony Farms of its intent to abandon the

¹ FVW is a wholly owned subsidiary of Wisconsin Central Transportation Corporation.

² In its petition, FVW has not supported its request for exemption from section 10904 involving offers of financial assistance and section 10905 involving public use conditions. Accordingly, we will limit our consideration of the exemption request to section 10903.

³ WisDNR is the lead state agency responsible for designating, acquiring, developing for public use, and maintaining a system of state trails as part of the state park system for use by equestrians, bicyclists, cross country skiers or hikers.

⁴ WisDOT is the designated state agency for rail matters in the State of Wisconsin. It is responsible for all state and federally aided highway and airport construction within the state and has the statutory first right to acquire for present or future transportation, recreational, or scenic purposes any property used in operating a railroad that is abandoned in Wisconsin.

line and that the shipper does not contest the proposed action. According to FVW, Anthony Farms is currently making arrangements to support its operations from another railroad location off this line. After abandonment, FVW plans to use the line's salvageable track and materials to upgrade and maintain its other active rail lines. Any remaining materials will be sold as scrap.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. Moreover, by allowing FVW to avoid maintenance and operating expenses on the line and to apply its assets more productively elsewhere on its system, an exemption will foster sound economic conditions and encourage efficient management [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The record in this proceeding indicates that the only active shipper on the subject line, Anthony Farms, does not object to the proposal and is planning to use another location off the line for rail service.⁵ Nevertheless, to ensure that Anthony Farms is informed of our action, we will require FVW to serve a copy of this decision and notice on that shipper within 5 days of the service date and to certify to us that it has done so.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

FVW has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on February 8, 1999.

⁵ Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

In the EA, SEA indicated that WisDOT has expressed concern regarding the disposal of debris during salvage operations. WisDOT requested that FVW: (1) comply with the WisDOT Abandoned Railroad Line Salvage and Clean-up Policy Standards/Procedures; (2) protect surveying benchmarks, monumentation, and mapping information on the right-of-way; and (3) remove rail, ties, and ballast at the state highways and obtain a permit from the District Maintenance Section. According to WisDOT, FVW would need to handle traffic while the crossing is being removed, and the highways should be restored after salvage operations are complete.⁶

SEA also notes that WisDNR has expressed concern about water quality, designated wetlands, 100-year floodplains, endangered and threatened species/critical habitat, and waste and demolition disposal. WisDNR indicated that: (1) proper erosion control measures must be used and maintained during and after salvage operations (according to WisDNR, an erosion control plan should be developed and made part of the project plans and specifications, all areas of disturbed soil should be restored to original grade and re-seeded as soon as possible, and native species should be used where appropriate); (2) if the right-of-way is not used for transportation or trail purposes, all fills should be removed and the original contours and vegetation re-established (any work in the wetlands may require local, state and/or U.S. Army Corps of Engineers permits); (3) if the right-of-way is to be used for transportation or trail purposes, the existing bridges and culverts may remain in place if maintained (if the right-of-way is not used in this manner, all structures must be removed completely and the embankments regraded and permanently stabilized); (4) the federally listed species, karner blue butterfly (*Lycaeides melissa samuelis*), is found along the right-of-way near Ogdensburg, and the area where the butterfly habitat is located should be fenced to prevent disturbing the site during salvage operations; and (5) demolition and waste material cannot be recycled or disposed of in wetland or surface waters. WisDNR stated that a plan should be developed describing the method and location of all waste and demolition materials disposal.

Also, the U.S. Department of Commerce, National Geodetic Survey (NGS), has advised that 13 geodetic station markers have been identified that may be affected by the proposed abandonment. NGS requested that it receive not less than 90 days' notification in advance of any salvage activities in order to plan for their relocation.

Finally, SEA states that the U.S. Environmental Protection Agency-Region 5 (EPA Region-5) has indicated that FVW should specify the method that will be used to remove the rail line, either by lifting the rail off the ties or by plowing the ties out of the ground and any environmental impacts associated with the method.

⁶ FVW, in its environmental report, stated that all salvage operations would comply with procedures previously approved by the State of Wisconsin in 1992 and outlined in Wisconsin Central Ltd.--Abandonment Exemption--in Douglas County, IN, Docket No. AB-303 (Sub-No. 10X) (ICC served Feb. 23, 1994).

Therefore, SEA recommended that the following environmental conditions be imposed on any decision granting abandonment authority: (1) FVW shall consult with the WisDOT prior to salvage operations; (2) FVW shall consult with the WisDNR prior to salvage operations; (3) FVW shall notify NGS at least 90 days prior to salvage activities in order to plan the relocation of the 13 geodetic station markers that may be affected by the proposed abandonment; and (4) FVW shall consult with the EPA-Region 5 prior to salvage operations.

A comment to the EA was filed by the U.S. Department of the Interior, Fish and Wildlife Service (FWS). Like WisDNR, FWS is concerned about the karner blue butterfly. FWS requests that FVW comply with specific protective measures during salvage operations to avoid adversely affecting the butterfly. FWS indicates that: (1) the work on the right-of-way should be kept to 8 feet on either side of the center line of the existing track; (2) no materials are to be piled along the grande; and (3) in the area where wild lupine exist, a snow type fence should be erected and a qualified botanist should field check the area to determine where the fence should be placed (salvage operations should be conducted beginning in late April to early May, but is probably easiest in late May when the wild lupine is in flower and highly visible). Therefore, SEA recommends that FVW consult with FWS prior to salvage operations.

We will impose the conditions recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As stated, WisDNR and WisDOT request that interim trail use/rail banking be imposed under the National Trails System Act, 16 U.S.C. 1247(d), and the regulations at 49 CFR 1152.29. WisDOT states that WisDNR will use or preserve the land corridor and related real property for interim public transportation and recreational purposes (including highway, pedestrian and other trail uses), subject to restoration for railroad purposes. WisDNR has submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. By letter filed January 4, 1999,⁷ FVW states that it does not object to the request and that it is willing to negotiate with WisDNR for interim trail use.

The request complies with the requirements of 49 CFR 1152.29 and FVW is willing to enter into negotiations. Therefore, we will issue a NITU for the described line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, FVW may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

⁷ A fax transmittal of this filing was received at the Board on December 30, 1998.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986) (Trails), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 U.S.C. 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

SEA has indicated in its EA that the right-of-way may be suitable for public use after abandonment. We note that no one has sought a public use condition, and none will be imposed.⁸

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903, the abandonment by FVW of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), subject to a NITU permitting interim trail use/rail banking for the line, and subject to the conditions that FVW shall: (1) consult with the Wisconsin Department of Transportation prior to salvage operations; (2) consult with the Wisconsin Department of Natural Resources prior to salvage operations; (3) notify the National Geodetic Survey at least 90 days prior to salvage activities in order to plan the relocation of geodetic station markers that may be affected by the proposed abandonment; (4) consult with the U.S. Environmental Protection Agency-Region 5 prior to salvage operations; and (5) consult with the U.S. Department of the Interior, Fish and Wildlife Service, prior to salvage operations.

2. FVW is directed to serve a copy of this decision and notice on Anthony Farms within 5 days after the service date and to certify to the Board that it has done so.

⁸ Public use requests were due no later than 20 days after publication of the notice of the petition for exemption in the Federal Register, or by January 19, 1999.

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, FVW may fully abandon the line, provided the conditions imposed above are met.

6. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. An OFA under 49 CFR 1152.27(c)(1)⁹ to allow rail service to continue must be received by the railroad and the Board by April 9, 1999, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,000. See 49 CFR 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

9. Provided no OFA has been received, this exemption will be effective on April 29, 1999. Petitions to stay must be filed by April 14, 1999, and petitions to reopen must be filed by April 26, 1999.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), FVW shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by FVW's filing of a notice of consummation by March 30, 2000, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

⁹ See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997).

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By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary